

Suzanne BASTID
Vice-President

Nicolas TESLENKO
Acting Executive Secretary

Herbert REIS
Member

New York, 28 September 1982

Judgement No. 293

(Original: English)

Case No. 275:
Nayyar

**Against: The Secretary-General
of the United Nations**

Request for rescission of a decision not to promote a staff member.

Flaw in the work of the Appointment and Promotion Panel inasmuch as it did not proceed in the required way in evaluating the merits of staff members.—Acceptance of the Panel's report by the Administration.—Responsibility of the Administration.—Impossibility of determining whether the Applicant would have been promoted if the Appointment and Promotion Panel had followed the established procedure.—Award of \$1,000 to the Applicant as compensation.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Arnold Kean;
Mr. Luis de Posadas Montero;

Whereas at the request of Om Parkash Nayyar, a local staff member of the Office of the United Nations Development Programme, hereinafter called UNDP, at New Delhi, India, the President of the Tribunal, with the agreement of the Respondent, extended successively to 19 November 1981, 18 December 1981 and 18 January 1982 the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 January 1982, the Applicant filed an application the pleas of which read

“RELIEF SOUGHT

“The Appellant requested the JAB (Joint Appeals Board) and respectfully requests the Tribunal:

“(1) To find that . . . the APP [Appointment and Promotion Panel] had:

“(a) failed to observe due process and principles of equity; and/or

“(b) failed to act in accordance with the Staff Rules and the Guidelines of

the APP; and/or

“(c) made substantial errors of fact and law; and/or

“(d) failed to make due or proper recommendation in good faith and with due consideration of the rights of the Appellant; which in fact and in law amounts to the failure to make a recommendation as required of it;

“(2) To find that in accepting and acting on the recommendation of the APP the Respondent failed to duly exercise the decision regarding the promotion of the Appellant;

“(3) To rescind the decision of the Respondent not to promote the Appellant communicated by a letter dated 31 March 1978 by the Director of the Division of Personnel.

“(4) To find further, that the written presentations, consisting of the basic documentation placed before the APP, necessarily required the APP to recommend his promotion. Any reasonable and impartial APP duly constituted and acting without prejudice, in accordance with due process, justice and equity in the proper performance of its duties, could only have acted accordingly.

“(5) Consequently to recommend the Respondent:

“(a) to reject the findings and recommendations of the APP, and

“(b) to effect the promotion of the Appellant to Level V with the effect from 1 January 1977; or alternatively

“(c) to compensate the Appellant for the loss of emoluments resulting from the failure to promote the Appellant from 1 January 1977; or

“(d) to grant such other relief that may seem appropriate.”

Whereas the Respondent filed his answer on 12 March 1982;

Whereas the Applicant filed written observations on 12 May 1982;

Whereas the Respondent submitted an additional written statement on 3 June 1982;

Whereas the President of the Tribunal decided not to grant the Applicant's request for oral proceedings;

Whereas Counsel for the Applicant submitted supplementary written observations on 16 September 1982;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Technical Assistance Board Office at New Delhi, India, on 30 April 1965 under a three-month appointment as a Junior Assistant-Typist at the ND-3 level. On 1 August 1965 he received a one-year fixed-term appointment which was converted into an indefinite appointment as a Typing Clerk on 1 August 1966. On 1 February 1969 he was promoted to the ND-4 level as a Secretarial Assistant and on 1 November 1972 he was granted a permanent appointment. On 11 March 1976, in a memorandum to Mr. H. Kaufman, Chairman of the Appointment and Promotion Panel, Mr. G. D. Merrem, Section Chief, recommended the Applicant's promotion to the ND-5 level on the ground that he had demonstrated capacity to take on more responsible work. On 31 March 1976 the Applicant's supervisor, Mr. V. Kolchin, Senior Industrial Development Field Adviser (SIDFA), endorsed that recommendation in a memorandum addressed to Mr. Kaufman. On 25 June 1976, the 1976 promotion list having been issued, the Applicant wrote to the Resident Representative a.i.—Mr. Kaufman—to express his

disappointment that his name did not figure on the list. On the same day the Applicant met with Mr. Kaufman and recorded the following note in the file:

“Discussed with Mr. Kaufman today. Mr. Kaufman assured me that I have a very good clean record but due to the absence of an additional vacancy to ND5 level in the budget, I could not be promoted this year. He further assured me that my case is on the border-line and I am definitely going to be promoted next year. He also further advised me that I should not go for any recourse appeal etc.”

On 31 March 1977 Messrs. Kolchin and Merrem sent to Mr. D. R. Malhotra, the new Chairman of the Appointment and Promotion Panel, a joint memorandum in which they reiterated their recommendation for the promotion of the Applicant. On 28 July 1977, in a letter addressed to the Resident Representative, the Applicant mentioned that he had received in the mail an anonymous “Special Bulletin extracts from the recommendations of the Appointment and Promotion Panel held from 13 to 15 April 1977” from which it appeared that his name was not included in the 1977 promotion list; the letter continued:

“Even before the receipt of the anonymous special bulletin I had feared that the present composition of the APP would not give me due justice. Having heard of no refutation from any member of the APP on the contents of the special bulletin my fear is now fully confirmed. I am prepared to substantiate my belief about the biased attitude of the present members of the APP with whom I had at one time or the other had misunderstandings due to my nature of being a frank, fearless and fair-minded person. While I can also substantiate the general nature of these peoples by quoting other instances, I prefer to keep this issue only confined to their attitude towards me.

“ . . . ”

On 2 August 1977 the Resident Representative replied:

“ . . . ”

“As the promotion list for 1977 has not yet been published due to unavoidable circumstances, I cannot take any action on your [letter]. If your name is not included in the promotion list when it is published, you may wish to use the recourse action which is open to all staff members according to rules.

“Finally I am sorry I cannot agree with your statement about ‘the biased attitude of the present members of the APP’. On my behalf I can assure you that no personal considerations will prevail when your candidature for promotion will be considered along with other eligible candidates.”

On 12 August 1977 the Chief of the Policies and Procedures Section of the UNDP Division of Personnel advised the Applicant that a staff member who believed that his case for promotion had not been duly recognized had the option of submitting a recourse under the terms of UNDP/ADM/PER/137—“Promotion Reviews for 1977”. On 23 August 1977 the Applicant sent the following letter to the Resident Representative:

“I have come to know that you have already announced promotions of the local staff vide your circular No. ADM/250/34 dated 22-8-77 and my name does not figure in the promotions announced this year also.

“In this connection, I would be very much grateful to you, Sir, if you would very kindly supply me the following information at your earliest convenience before

I submit my recourse appeal:

“(1) The *reasons* as to why I was not considered for promotion; and

“(2) the written information submitted by the administration to the APP members at the time of promotions review.

“The above request is made by me in accordance with paras. 2.4 and 2.6 of UNDP Personnel Policies and Practices guidelines received by UNDP Administrator Mr. BRADFORD MORSE’S circular No. UNDP/ADM/HQTRS/296 - UNDP/ADM/FIELD/491 dated 23 March 1977.

“ . . . ”

On 30 August 1977, in a further letter to the Resident Representative copied to the Chief of the Policies and Procedures Section, the Applicant again asked for the reasons why he had not been considered for promotion. In a reply dated 9 September 1977 the Resident Representative stated that the documentation provided to the Appointment and Promotion Panel consisted of a list of all staff members time-wise qualifying for consideration for promotion, recommendations wherever received from the supervisors and the non-privileged personnel files for perusal. On 12 September 1977 the Chief of the Policies and Procedures Section, referring to the Applicant’s letter of 30 August 1977, advised him that “we cannot intervene with the Appointment and Promotion Panel and ask them for the reasons for not recommending you for promotion, because the deliberations of *all* Appointment and Promotion Boards and Panels are strictly confidential”. The Deputy Resident Representative—Mr. Kaufman—having requested from the Chairman of the Appointment and Promotion Panel the details of the promotion review of the Applicant, received from the latter the following reply dated 10 October 1977:

“In response to your request for the details of considerations in respect of the promotion review of Mr. O. P. Nayyar, here are the views of the APP in this case:

“1. The APP noted with satisfaction his good performance in his present duties.

“2. The APP could not however be assured, beyond doubt, of his capabilities to shoulder higher responsibilities.

“3. It was the APP’s view on the basis of individual knowledge of him that he seriously lacked essential qualities which would enable him to cultivate good relations with his colleagues. On a further in-depth evaluation of his performance reports, the APP came to the conclusion that they could not concur with the outstanding report given to him.

“4. In view of the above consideration and the availability of a limited number of posts, it was the unanimous view of the APP that Mr. Nayyar did not merit promotion this year in comparison with his other two colleagues who were recommended.”

On the same day Mr. Kaufman conveyed Mr. Malhotra’s reply to the Applicant. On 12 October 1977 the Applicant filed with the Secretary of the Appointment and Promotion Panel a letter requesting reconsideration of his promotion in accordance with the recourse procedure set out in UNDP/ADM/PER/137; the letter provided additional information to the Panel and continued:

“2. At the time of APP meeting, it can be safely assumed that the Administration did not make it known to the APP that the post of SIDFA’s Secretary is

budgeted at ND-5 level. In this connection, I may mention here that earlier two of my colleagues have been promoted on this seat i.e. Mr. Sat Pal and Mr. G. Raman. Both were performing the same duties and functions as I have been performing since January 1976 to the entire satisfaction of my immediate superiors. Further, Mr. Kolchin in his communication dated 31 March 1976 has confirmed about the budgeting of this post as of ND-5 level. So the APP's contention that they could not be assured of my capabilities to shoulder higher responsibilities is not well founded as SIDFA's Secretary post is of ND-5 level and even after SIDFA's departure on 15 April 1977 I have been performing the same functions. I am sure if this fact had been known to the APP the position would have been quite different.

"3. Regarding my personal relations with other colleagues, I submit that APP has gone beyond their jurisdiction to comment that I lack essential qualities to maintain healthy staff relations in spite of the fact that I have been getting full marks from my immediate superiors about my staff relations, and never verbally or in writing I have been informed by the Administration otherwise. I am no doubt a bit talkative and outspoken but this should not be taken as an offensive or disqualification when the career of a staff member is concerned. I recollect that some years ago I had exchanges with the two out of the three present APP members not on account of any official business but on personal and Staff Association matters. So I fear that those members have chosen this opportunity to take vindictive action and demoralize me to satisfy their ego. According to me, the APP has gone beyond their jurisdiction as stated above particularly when they state that they have come to the conclusion that they could not concur with the outstanding reports given to me. This raises another issue whether it is for the office to comment on the individual's performance given or it is left to APP to comment on these in any way they like contrary to the established procedures. So instead of the written information provided by the office, they have come to a seemingly wrong conclusion, and indulged in character assassination and relied more on their individual assessments keeping in view the period I had worked with them. If this unwarranted trend continues in the meetings of the APP, these bodies then cannot do full justice to the staff members for which they have been formed.

"I therefore submit that the APP has erroneously decided that my present functions are not of ND-5 level and secondly I do not maintain healthy relations with the staff.

" . . . "

On 18 November 1977 the Secretary of the Appointment and Promotion Panel informed the Applicant that, after a careful consideration of his recourse request, the Panel had decided to maintain its earlier recommendation. On 8 March 1978 the Applicant requested the Administrator of UNDP to review the decision not to promote him. On 31 March 1978 the Director of the UNDP Division of Personnel informed the Applicant that the Administrator, having reviewed his case, had found no reason to amend the decision; he stated *inter alia*:

"Our review has revealed that all the relevant procedures were respected in your regard and that you were accorded the benefit of a full consideration by the Panel. Moreover, we found no reason to disagree with the explanation given by the Panel on the basis of which it rendered its recommendations to the Resident Representative and which he had accepted.

“With respect to your allegation that two of the members of the Panel were prejudiced against you, we completely reject such unsubstantiated allegation. Furthermore, you should be aware that such allegation is very serious and must be supported by incontrovertible proof. The statements you submitted on this subject do not amount to any proof but are merely your own conclusions. We, however, found no evidence of any prejudice or extraneous motivation on the part of the two members to vitiate the Panel’s unanimous recommendation.”

On 8 May 1978 the Applicant lodged an appeal with the Joint Appeals Board. On 1 January 1979 he was promoted to ND-5. On 14 January 1981 the Joint Appeals Board submitted its report. The Board’s conclusions and recommendations read as follows:

“Conclusions and recommendations

“29. The Board finds that the APP committed a fundamental error in negating the appellant’s performance evaluation reports, and that by tacitly accepting that action through its unqualified transmission of the APP’s statement to the appellant, the administration joined in that error.

“30. The Board recommends that in view of the fact that that error cannot be corrected the appellant should be given one thousand dollars (\$1,000.00), being the equivalent of three months base salary at the appellant’s present level, as compensation for the moral wrong which he has suffered as a result of the APP’s error.”

On 15 July 1981 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General, having re-examined his case in the light of the Board’s report, had decided not to accept the Board’s conclusions and recommendations. On 19 January 1982 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Administration carried out a continuous process of harassment and victimization against the Applicant. Besides overt acts of prejudice directed against the Applicant, prejudice is also established inferentially, as the only reasonable conclusion to be drawn from the conduct, acts and omissions of certain members of the Administration and the Appointment and Promotion Panel. Prejudice is also shown in the circumstances surrounding certain administrative actions.

2. The decision not to promote the Applicant is invalid and cannot be sustained as the Appointment and Promotion Panel at the March 1977 Promotion Review and at the subsequent November 1977 Recourse Proceedings:

(a) did not observe due process as the Panel acted in breach of basic procedural rules and of the procedural rules laid down in the Provisional Guidelines for UNDP Field Office Appointment and Promotion Panels;

(b) did not conduct a proper assessment, in that the assessment of the efficiency and performance of the Applicant was arbitrary, capricious or dictated by improper motives;

(c) did not make a recommendation as required of it on the basis of equity or in terms of the Guidelines; and

(d) made errors in fact and in law in arriving at its recommendation.

3. The Administration incurred liability for the deterioration of the Applicant’s state of health.

Whereas the Respondent’s principal contentions are:

1. Staff members have no right to promotion and, absent prejudice or improper motive, a decision whether or not to promote a staff member is not subject to review by the Tribunal;

2. As staff members have no right to promotion it follows that even assuming the commission of a procedural error by a Promotion Body such error cannot give rise to an entitlement to damages. In any event, no error was committed by the Promotion Body in this case.

3. The fact that Respondent does not accept a Joint Appeals Board recommendation cannot entitle a staff member to damages since Joint Appeals Board recommendations are purely advisory and have no legal effect in themselves.

4. The question of the deterioration of Applicant's state of health should be considered under Appendix D of the Staff Rules governing Compensation in the Event of Death, Injury or Illness attributable to the Performance of Official Duties on Behalf of the United Nations.

The Tribunal, having deliberated from 21 September to 1 October 1982, now pronounces the following judgement:

I. The Tribunal finds that the Appointment and Promotion Panel has disregarded rule 16 of the Provisional guidelines for UNDP Field Office Appointment and Promotion Panels insofar as that rule requires written presentations by the appropriate supervisor to be taken as the basis of the evaluation of the staff member's performance and only admits additional information to be produced before the Panel at its special request. In this instance, the panel has not complied with the above-mentioned procedure and has substituted, in judging the staff member's merits, the personal opinions of some of its members for the evaluation made by the appropriate supervisor.

This action undoubtedly constitutes a flaw in the work of the Panel inasmuch as it constitutes, as stated above, a breach of the required way of evaluating the merits of staff members.

The Administration tacitly accepted the Panel's method of proceeding by accepting its report in which it was clear that the personal opinions of some members of the Panel and not the appropriate supervisor's evaluation had prevailed in considering the Applicant's performance.

II. On this basis the Tribunal reaches the conclusion that the Administration must be held liable.

III. Having established the existence of a flaw in the work of the Panel and the existence of a liability on the part of the Administration, the task of the Tribunal is to establish the exact consequences for the Applicant and to determine the exact means to be employed to compensate the prejudice he may have suffered. In this respect, the Tribunal holds that the existence of flaws in the proceedings of the Panel, even if they may be held to vitiate the results of the body's work, in no way indicate that, had the Panel observed the due procedure, the Applicant would have been promoted.

From this, it follows that the Applicant is neither entitled to compensation for the loss of remuneration suffered upon his non-promotion in 1977, nor to compensation through accelerated promotion henceforth. Nevertheless, the Tribunal finds that by refusing, on the basis of personal opinions of members of the Panel, to concur with the reports given to the Applicant by his appropriate supervisors, the Panel and consequently the Administration have committed a serious procedural error.

IV. The Tribunal, furthermore, finds that, even if it is impossible to prove whether the Applicant's possibilities of promotion have or have not suffered as a consequence of such error, the Administration is liable and consequently adequate compensation should be given to the Applicant.

V. For the above-mentioned reasons, the Tribunal decides that, in view of the fact that the procedural error committed cannot be corrected otherwise, the Respondent shall pay to the Applicant one thousand dollars.

VI. With regard to the alleged deterioration of the Applicant's health as a consequence of the action of the Administration, the Tribunal finds that the Applicant has not produced sufficient evidence.

(Signatures)

Suzanne BASTID

Vice-President, presiding

Arnold KEAN

Member

New York, 1 October 1982

Luis M. de POSADAS MONTERO

Member

Nicolas TESLENKO

Acting Executive Secretary

Judgement No. 294

(Original: English)

Case No. 271:
Pattillo

Against: **The Secretary-General
of the United Nations**

Request for interpretation of Judgement No. 286.

The Tribunal set the amount of its award on the basis of an erroneous calculation supplied to it.—Correction of Judgement No. 286 in accordance with Article 12 of the Statute.—Award of an additional amount of \$7,408.99.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Samar Sen, Vice-President; Mr. Herbert Reis;

Whereas in Judgement No. 286, delivered on 11 May 1982, the Tribunal decided that the Respondent should pay "four thousand dollars to the Applicant";

Whereas after a sequence of calculations and recalculations, the Office of Financial Services issued on 28 April 1982 to the Applicant a cheque for the sum of \$8,408.99